

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WGME Licensee, LLC)	
)	CSR-6947-N
Petition for Waiver of Section 76.92(f))	
of the Commission's rules.)	

ORDER ON RECONSIDERATION

Adopted: September 27, 2010

Released: September 28, 2010

By the Associate Chief, Media Bureau:

I. INTRODUCTION

1. WGME Licensee, LLC, licensee of station WGME-TV (CBS), Portland, Maine ("WGME-TV"), has filed a petition for partial reconsideration of the Bureau's decision granting in part WGME-TV's petition for waiver of the significantly viewed exception under the network nonduplication rules ("exclusivity rules").¹ No opposition to this petition was received. For the reasons listed below, we deny WGME-TV's petition for partial reconsideration.

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.² Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the network nonduplication rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").³ The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.⁴

¹ *WGME Licensee, LLC*, 21 FCC RCD 13668 (2006) ("Bureau Order").

² See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

³ 47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

⁴ 47 C.F.R. §76.106(a).

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁵ that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b). Section 76.5(i) of the Commission's rules requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.⁶ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.⁷ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁸

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."⁹ Over time, The Nielsen Company ("Nielsen") became the primary surveying organization through which a petitioner could obtain television surveys.¹⁰ Nielsen, which routinely surveys television markets to obtain television stations' viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹¹ Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹² If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percent of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the

⁵103 FCC 2d 407 (1986).

⁶47 C.F.R. §76.5(i).

⁷ *Id.*

⁸See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

⁹47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

¹⁰Nielsen Media Research recently changed its name to The Nielsen Company.

¹¹Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹²It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

cable system.¹³ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the over-the-air data that it collects for its routine audience sweep periods, selecting in-tab diaries from its database from the area served by a cable system or an individual cable community.¹⁴ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data, pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.¹⁵ Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (*e.g.*, a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.¹⁶ Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁷ A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. In its initial petition, WGME-TV sought a waiver of the significantly viewed exception to the network nonduplication rules so that it could assert its rights to network nonduplication against station WBZ-TV (CBS), Boston, Massachusetts ("WBZ-TV") in various communities in the Portland-Poland Spring, Maine designated market area ("DMA") served by nine separate cable systems.¹⁸ The Bureau

¹³47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

¹⁴We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was provided by Nielsen. *See e.g., Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

¹⁵47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

¹⁶*Id.*

¹⁷Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level."

¹⁸ The cable systems and their respective communities at issue are as follows: 1) Cablevision -- Lebanon, Maine; 2) Comcast -- Berwick and South Berwick, Maine; 3) Comcast -- Eliot, Kittery and Kittery Point, Maine; 4)
(continued....)

granted WGME-TV's request with regard to two of the cable systems, both of which serve a single community – Cablevision--Lebanon, and Time Warner--Biddleford.¹⁹ WGME-TV's request with regard to the communities served by the remaining seven cable systems, however, was denied because WGME-TV failed to provide sufficient data to determine that WBZ-TV was no longer significantly viewed. Specifically, for the single community system, Adelphia-Acton, the submitted data did not contain any sample households, and for the remaining multi-community systems, WGME-TV failed to provide sample household data from all of the systems' communities, proportional to the population, in violation of Section 76.5(b) of the Commission's rules.²⁰

III. DISCUSSION

6. The issue before us is whether to grant, on reconsideration, WGME-TV's request for waiver of the significantly viewed exception to the network nonduplication rules for those cable systems which were denied by the *Bureau Order*. WGME-TV submitted viewership data for these systems on both a community-specific and system-specific basis, pursuant to Section 76.54(b) of the Commission's rules. On reconsideration, instead of providing new data, WGME-TV argues that the Commission's proportionality rules regarding such studies are outdated and that a strict adherence to precedent is not called for in this instance. We disagree with WGME-TV's arguments in this instance and reaffirm the *Bureau Order* because WGME-TV fails to support its contention that the circumstances herein are unique or that there is a special financial hardship preventing it from obtaining the required data.

7. In support of its petition for partial reconsideration, WGME-TV argues that the survey data provided for the systems for which waiver was denied conclusively demonstrated that WBZ-TV's viewing hours and net weekly circulation shares were zero for all of the communities at issue.²¹ As a result, WGME-TV maintains that the Bureau should have determined that WBZ-TV failed to meet the "significantly viewed" standard as set forth in Section 76.5(i) of the Commission rules.²² WGME-TV asserts that the "Bureau's unnecessarily strict adherence" to a proportionate sampling requirement is anachronistic because the non-cable/non-ADS sample can only be obtained from approximately 14 percent of the viewing population.²³ WGME-TV states that it is also important to note that WBZ-TV's

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Adelphia -- Acton, Maine; 5) Adelphia -- Alfred, Arundel, Buxton, Cornish, Dayton, East Waterloo, Hollis Center, Kennebunk, Kezar Falls, Limerick, Limington, North Waterloo, Saco, Waterboro and West Buxton, Maine; 6) Cablevision -- Acton, Lebanon, Sanford, Shapleigh and Springvale, Maine; 7) Time Warner -- Old Orchard Beach and Saco, Maine; 8) Time Warner -- Biddleford, Maine; and 9) Time Warner -- Cape Neddick, North Berwick, Qgunquit, Wells and York, Maine.

¹⁹See *Bureau Order*, 21 FCC Rcd at 13671-72.

²⁰See *Bureau Order*, 21 FCC Rcd at 13671-73. Section 76.5(b) states in pertinent part that "[i]f a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population." See 47 C.F.R. § 76.5(b).

²¹Reconsideration at 2.

²²*Id.* Section 76.5(i) of the rules states that a network station is deemed to be "significantly viewed" if it obtains "a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent" in noncable households. See 47 C.F.R. § 76.5(i).

²³*Id.* at 3-4.

predicted Grade B contour does not even cover any of the communities.²⁴ WGME-TV argues that, because these facts explain why it would be impossible for a significantly viewed survey to provide a proportional sample of noncable/non-ADS homes for every community, the Bureau should reconsider its strict adherence to this requirement.²⁵

8. The significantly viewed exception to the Commission's exclusivity rules prevents a station from excluding the programming of an otherwise distant station that has established a "significant" level of over-the-air viewership in a subject community.²⁶ In order to obtain a waiver of the significantly viewed exception, the Commission held in *KCST-TV, Inc.* that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, through methods set forth in Section 76.54(b).²⁷ Under Section 76.54(b), a single survey of a cable television system serving more than one community is appropriate so long as the sample includes over-the-air television homes from each community that are proportional to the population.²⁸

9. As stated in the *Bureau Order*, there is insufficient information to determine whether the communities at issue were proportionally represented in the samples used for the Nielsen tabulation of audience statistics.²⁹ While WGME-TV argues that it is "bordering on the impossible to provide such data for every community given the incredibly small number of non-cable/non-ADS homes which actually exist," WGME-TV has not explored other options such as special studies from Nielsen that might ensure sample placement in each community at issue.³⁰ Further, it should be noted that, in asking the Bureau to waive the application of the rule in this particular case, WGME-TV is actually asking the Bureau to ignore Commission precedent and determine that the rules themselves are invalid.³¹ Such a determination, however, cannot be made as a result of WGME-TV's petition for reconsideration, nor can the Bureau, acting on delegated authority, alter clear Commission precedent. Changes to existing rules can only be established through the Commission's rulemaking process.

10. Absent a correct diary placement, viewership levels in each of the communities are not adequately represented in the system-wide study. The proportionality requirement prevents the skewing of the submitted data by any significant variation among communities as to viewing habits and ensures

²⁴*Id.* at 4.

²⁵*Id.* at 4-5.

²⁶See *WTNH Broadcasting*, 16 FCC Rcd. 6791, 6782 (2001).

²⁷See 103 FCC 2d 407 (1986). For each year, the data must be the result of independent professional surveys taken during two one week periods separated by at least 30 days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September. See 47 C.F.R. § 76.54(b).

²⁸47 C.F.R. § 76.54(b).

²⁹See *Bureau Order*, 21 FCC Rcd at 13671-72.

³⁰See *Reconsideration* at 4-5.

³¹ See *KCST-TV, Inc. v. FCC*, 699 F. 2d 1185, 1192 (1983). The court emphasizes that "[i]t is well within an agency's authority to adhere strictly to its rules unless a party can show 'reasons why in the public interest the rule[s] should be waived.'" (citing *FPC v. Texaco, Inc.*, 377 U.S. 33, 39 (1964)). See also, *WAIT Radio v. FCC*, 458 F. 2d 1203, 1207 (1972) (emphasizing that "an applicant for waiver of a concededly valid FCC rule faces a high hurdle at the starting gate.").

that the inclusion or exclusion of specific communities does not affect the reported average audience statistics for the cable system. Because WBZ-TV had “zero” viewership in all the communities surveyed, WGME-TV asks us to assume that communities not included in their system-wide sample also had “zero” viewership. However, there is no basis for this assumption, without a proportional sample representative of all the communities served by each cable system. Moreover, WGME-TV had the option to choose a community-specific study rather than a system-wide study for those communities where a sample exists. Therefore, we hold that WGME-TV has failed to provide a statistically valid sample and meet the requirement that a system-wide significant viewing showing include all communities served by the system, proportional to population. Thus, WGME-TV has failed to show that it would be in the public interest to grant a waiver in this case.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the petition for partial reconsideration filed by WGME-TV **IS DENIED**.

12. This action is taken pursuant to authority delegated by Section 0.283 and 1.106 of the Commission’s rules.³²

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy, Associate Chief
Media Bureau

³²47 C.F.R. §§ 0.283 and 1.106.